



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 210, 212, 215, and 234

[Docket DARS-2019-0050]

RIN 0750-AK65

Defense Federal Acquisition Regulation Supplement: Market Research and Consideration of Value for the Determination of Price (DFARS Case 2019-D027)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement several sections of the National Defense Authorization Act for Fiscal Year 2017 to address how contracting officers may require the offeror to submit relevant information to support market research for price analysis, and allow an offeror to submit information relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item.

DATES: Effective **[Insert date of publication in the FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, telephone 571-372-6106.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the *Federal Register* at 84 FR 50812 on September 26, 2019, to implement sections 871 and 872 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328). Section 871 modifies 10 U.S.C. 2377, Preference for acquisition of commercial items, to state that, to the extent necessary to support market research for determination of the reasonableness of the price of commercial items, the contracting officer shall use the information submitted under 10 U.S.C. 2379(d) in the case of major weapon systems acquired as commercial items; and in the case of other items, the contracting officer may require the offeror to submit relevant information. Section 872 modifies 10 U.S.C. 2379, Requirement for determination by Secretary of Defense and notification to Congress before procurement of major weapon systems as commercial items, to allow an offeror to submit information or analysis relating to the value of a commercial item. One respondent submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

The final rule removes the discussion of value analysis at DFARS 234.7002(d)(5) and the associated definition of "value analysis" at DFARS 234.7001 from the proposed rule.

B. Analysis of Public Comments

Comment: The respondent supports the proposed rule, with a few exceptions. The respondent stated that in the proposed definition of "value analysis" at DFARS 234.7001, "cost" should be replaced with "price." According to the respondent, this is consistent with the Contract Pricing Reference Guide, which states, "A value analysis estimate results from a specialized analysis of the function of a product and its related price."

In addition, the respondent recommended that the word "legitimate" should be removed from the proposed DFARS 234.7002(d)(5), because "legitimate" is a subjective term that cannot be measured. According to the respondent, the policy should leave the determination of value to the discretion of the contracting officer.

Response: The final rule deletes the discussion of the use of value analysis and the associated definition. This discussion

and definition are not necessary for implementation of the statute, which provides that an offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item and that the contracting officer may consider such information or analysis in addition to other information submitted. The final rule still provides a reference to guidance at DFARS Procedures Guidance and Information 234.7003(d)(5), which in turn references to the Department of Defense Guidebook for Acquiring Commercial Items, Part B, Commercial Item Pricing—the more current guidebook.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not propose to add or modify any provisions, clauses, or the prescriptions for any provisions or clauses.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is not subject to E.O. 13771, because this rule is not significant regulatory action under E.O. 12866.

VI. Regulatory Flexibility Act

DoD does not expect this final rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, a final regulatory flexibility analysis has been prepared and is summarized as follows:

This final rule is issued in order to implement sections 871 and 872 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 (Pub. L. 114-328). The objective of this rule is to address the use of market research and consideration of value to support the determination of price reasonableness when acquiring commercial items. The legal basis of the rule is sections 871 and 872 of the NDAA for FY 2017.

There were no public comments in response to the initial regulatory flexibility analysis.

Based on data from the Federal Procurement Data System, DoD awarded 38,000 new commercial contracts to 16,429 small entities in FY 2018. There are an additional unknown number of small entities that submitted offers and did not receive awards (estimated at several thousand).

This rule does not impose any new reporting, recordkeeping, or other compliance requirements on small entities. DFARS 252.215-7010, Requirements for Certified Cost or Pricing Data, and Data Other Than Certified Cost or Pricing Data, already requires offerors to provide information necessary to determine that the price is fair and reasonable. Offerors are allowed, but not required, to submit information or analysis relating to the value of a commercial item for consideration by the contracting officer in determining price reasonableness.

DoD did not identify any significant alternatives that would minimize or reduce the significant economic impact, because there is no significant impact on small entities.

VII. Paperwork Reduction Act

The rule does not contain any new information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35) or impact any existing information collection requirements.

List of Subjects in 48 CFR Parts 210, 212, 215, and 234

Government procurement.

Jennifer Lee Hawes,

*Regulatory Control Officer, Defense Acquisition Regulations
System.*

Therefore, 48 CFR parts 210, 212, 215, and 234 are amended as follows:

1. The authority citation for 48 CFR parts 210, 212, 215, and 234 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 210—MARKET RESEARCH

2. Amend section 210.001 by—

a. In paragraph (a) introductory text removing “, agencies shall”;

b. Redesignating paragraphs (a)(i) and (ii) as paragraphs (a)(i)(A) and (B), respectively;

c. In the newly redesignated paragraph (a)(i)(A) removing “Conduct” and adding “Agencies shall conduct” in its place;

d. In the newly redesignated paragraph (a)(i)(B) removing the period and adding “; and” in its place; and

e. Adding a new paragraph (a)(ii).

The addition reads as follows

210.001 Policy.

* * * * *

(a) * * *

(ii) Contracting officers shall use market research, where appropriate, to inform price reasonableness determinations (see 212.209 and 234.7002).

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PART 212—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 212.209 by revising paragraph (a) to read as follows:

212.209 Determination of price reasonableness.

(a) In accordance with 10 U.S.C. 2377(d), agencies shall conduct or obtain market research to support the determination of the reasonableness of price for commercial items contained in any bid or offer submitted in response to an agency solicitation. To the extent necessary to support such market research, the contracting officer—

(1) In the case of major weapon systems items acquired as commercial items in accordance with subpart 234.70, shall use information submitted under 234.7002(d); and

(2) In the case of other items, may require the offeror to submit other relevant information.

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PART 215—CONTRACTING BY NEGOTIATION

4. Amend section 215.403-3 by adding paragraph (c) to read as follows:

215.403-3 Requiring data other than certified cost or pricing data.

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(c) *Commercial items.* For determinations of price reasonableness of major weapon systems acquired as commercial items, see 234.7002(d).

PART 234-MAJOR SYSTEM ACQUISITION

5. Revise section 234.7001 to read as follows:

234.7001 Definition.

As used in this subpart—

Major weapon system means a weapon system acquired pursuant to a major defense acquisition program.

6. Amend section 234.7002 by revising paragraph (d) introductory text and adding paragraph (d)(5) to read as follows:

234.7002 Policy.

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(d) * * * See 212.209(a) for requirements of 10 U.S.C. 2377 with regard to market research.

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(5) An offeror may submit information or analysis relating to the value of a commercial item to aid in the determination of the reasonableness of the price of such item. A contracting officer may consider such information or analysis in addition to

the information submitted pursuant to paragraphs (d) (1) and (2) of this section. For additional guidance see PGI 234.7002 (d) (5) .

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